IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. [illegible]

RODOLFO SIFUENTES,

PETITIONER,

-vs-

UNITED STATES OF AMERICA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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SUBJECT INDEX

	Pages
TABLE OF AUTHORITIES	ii
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED FOR REVIEW	2
CONSTITUTIONAL PROVISION, STATUTE AND REGULATION INVOLVED	2, 3
STATEMENT OF THE CASE	3, 4, 5
REASONS FOR GRANTING THE WRIT	5, 6, 7, 8, 9
CONCLUSION	9
APPENDIX A	--
APPENDIX B	--

TABLE OF AUTHORITIES

CASES

	Pages
Camara v. Municipal Court, 387 U.S. 523 (1967)	6
Carroll v. United States, 267 U.S. 132 (1925)	6
McDonald v. United States, 335 U.S. 451 (1948)	8
United States v. Brignoni-Ponce, ____ U.S. ____ (June 30, 1975)	5, 6, 8
United States v. Fuentes, 379 F. Supp. 1145 (S.D. Texas, 1974)	1, App. B
United States v. Ortiz, ____ U.S. ___ (June 30, 1975)	5, 6
United States v. Santibanez, ____ F.2d ____ (5 Cir., August 11, 1975)	1, App. A

UNITED STATES CONSTITUTION

Fourth Amendment	2, 5, 6, 9

UNITED STATES STATUTES

8 U.S.C. §1324(a)(2)	2
8 U.S.C. §1357	2, 3
28 U.S.C. §1254(1)	2

UNITED STATES REGULATION

8 C.F.R. §287.1	3

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Petitioner Rodolfo Sifuentes respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered on 8 August 1975.

OPINIONS BELOW

The Court of Appeals rendered its opinion on 8 August 1975, and entered judgment on the same date. In this opinion the Court referred to its opinion in the case of United States v. Santibanez, which is dated 11 August 1975. Both of these opinions, which have not been officially reported as yet, are attached as Appendix A. A memorandum opinion (unpublished) written by the United States District Judge, the Honorable Reynaldo G. Garza, after the trial in this case is also appended hereto, together with Judge Garza's opinion in United States v. Fuentes, 379 F. Supp. 1145 (S.D. Texas, 1974), which Judge Garza attached to and incorporated by reference in his said memorandum opinion in Petitioner's case. Both of said opinions by Judge Garza are attached as Appendix B.

JURISDICTION

On 8 August 1975 the Court of Appeals entered judgment affirming the criminal conviction of Petitioner for transporting four illegal aliens by motor vehicle in violation of Title 8, United States Code, Section 1324(a)(2). (App. A) The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals correctly decide that the rights of Petitioner under the Fourth Amendment to the Constitution had not been violated when he was stopped without cause, suspicion or warrant at a permanent Border Patrol checkpoint between 65 and 90 miles from the border for the purpose of inspecting and questioning him and searching, at least visually, the lower interior of his vehicle?

2. Away from the border, do the same Fourth Amendment rules and guarantees apply to stops at Border Patrol checkpoints as apply to stops by roving patrols?

3. Do Fourth Amendment guarantees forbid the Border Patrol from making an investigative stop of every vehicle that travels through a permanent checkpoint located many miles from the border?

CONSTITUTIONAL PROVISION, STATUTE AND REGULATION INVOLVED

The Fourth Amendment to the Constitution of the United States is involved, which is as follows:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Title 8, United States Code, Section 1357, (Section 287 of the Immigration and Nationality Act), is involved, which is in pertinent part as follows:

> "(a) Any officer or employee of the Service authorized under regulations prescribed by the Attorney General shall have power without warrant---
>
> (1) to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States;"

* * *

"(3) within a reasonable distance from any external boundary of the United States, to board and search for aliens any vessel within the territorial waters of the United States and any railway car, aircraft, conveyance, or vehicle, and within a distance of twenty-five miles from any such external boundary to have access to private lands, but not dwellings, for the purpose of patrolling the border to prevent the illegal entry of aliens into the United States; and "

* * *

Title 8, Code of Federal Regulations, Section 287.1, is involved, which is in pertinent part as follows:

"(a) (1) External boundary. The term 'external boundary,' as used in section 287(a)(3) of the Act, means the land boundaries and the coast line of the United States, including the ports, harbors, bays and other enclosed arms of the sea along the coast, and a marginal belt of the sea extending three geographic miles from the outer limits of the land that encloses an arm of the sea.

(2) Reasonable distance. The term 'reasonable distance,' as used in section 287(a)(3) of the Act, means within 100 air miles from any external boundary of the United States or any shorter distance which may be fixed by the district director, or, so far as the power to board and search aircraft is concerned, any distance fixed pursuant to paragraph (b) of this section.

(b) Reasonable distance; fixing by district directors. In fixing distances not exceeding 100 air miles pursuant to paragraph (a) of this section, district directors shall take into consideration topography, confluence of arteries of transportation leading from external boundaries, density of population, possible inconvenience to the traveling public, types of conveyances used, and reliable information as to movements of persons effecting illegal entry into the United States: Provided, That whenever in the opinion of a district director a distance in his district of more than 100 air miles from any external boundary of the United States would because of unusual circumstances be reasonable, such district director shall forward a complete report with respect to the matter to the Commissioner, who may, if he determines that such action is justified, declare such distance to be reasonable."

* * *

STATEMENT OF THE CASE

In the early morning hours of April 28, 1974, Petitioner's car was routinely stopped by the Border Patrol at its permanent checkpoint on U. S. Highway 77 near Sarita, Texas. As the Border Patrol agent approached he could see no one in the vehicle except Petitioner; but when he got close enough to see the car's lower interior, he saw one man lying down on the front seat and three more lying down on the back seat. The Border Patrol agent would not have been able to discover these four individuals if he had not been able to get "right on" the stopped

vehicle to look down into its lower interior.

The investigating officer determined that the four persons he had discovered lying down in Petitioner's car were all illegal Mexican aliens, and the Petitioner and the four aliens were all arrested. These four aliens were subsequently convicted of being in the United States illegally, and after receiving suspended sentences on April 29, 1974, were held in jail by the Government as material witnesses until Petitioner's trial.

The Border Patrol checkpoint where Petitioner's car was stopped was a permanent checkpoint operated 24 hours a day. It was closed only when bad weather caused poor visibility on the highway. The checkpoint is between 65 and 90 miles from the Mexican border, and at the time in question all vehicles passing north through the checkpoint were checked by the Border Patrol. Appropriate traffic signals were set up to accomplish this. It was routine at this checkpoint for an officer to approach close enough to every stopped vehicle to enable him to visually inspect its interior, unless the officer recognized the occupants as local people who must go through the checkpoint almost daily.

U. S. Highway 77 runs from the Mexican border at Brownsville north into the interior. There are several fairly large cities, as well as a number of smaller communities, between the border and this checkpoint, and a substantial amount of traffic flows north through the checkpoint. The checkpoint has been situated at the same spot since August, 1973, but there was a moving checkpoint in this area for years prior to that time.

Before trial Petitioner filed a motion to suppress all the evidence obtained directly or indirectly by the Government when he was stopped at the checkpoint. The trial Court elected to "carry it along" and heard this motion with the jury trial on the merits. Despite Petitioner's objections, the Government called as witnesses at the trial the Border Patrol checkpoint agent and the four aliens. Petitioner's motion to suppress the evidence was overruled when the Government rested; it was renewed at the close of all testimony and was again overruled. The jury found Petitioner guilty on all four counts, and he was sentenced to imprisonment for terms of two years, but to serve six months with the remainder

suspended, and to probation. He was not imprisoned during his appeal to the Court of Appeals, and a motion has been filed asking the Court of Appeals to stay its mandate in this case pending this petition for writ of certiorari.

REASONS FOR GRANTING THE WRIT

The establishment by the Border Patrol of highway checkpoints well away from the border which stop for investigation each and every vehicle traveling through them has raised serious Fourth Amendment problems. In the recent case of United States v. Ortiz, ___ U.S. ___ (June 30, 1975), this Court put to rest one of these problems by holding that an officer could not search the trunk of a vehicle stopped at a checkpoint without consent or probable cause. But the Ortiz opinion made it clear that this Court did not decide the question of whether Border Patrol officers may stop a motorist at a checkpoint to question him and to at least visually search the interior of his vehicle without warrant, cause or reason. This question is presented in Petitioner's case, and it is of such constitutional importance as to qualify for consideration and resolution by this Court.

United States v. Ortiz, supra, may have dealt a severe blow to the Border Patrol's operations at its highway checkpoints away from the border, and there seems little doubt that if Petitioner's contentions herein are sustained by this Court, then these permanent checkpoints will pass into well-deserved oblivion. At these checkpoints each and every vehicle is systematically stopped for investigation and perhaps interrogation of its occupants. The checkpoint officer looks over the occupants and usually at least inquires of their citizenship. He also visually searches the lower interior of the car. Whenever he deems it appropriate the checkpoint officer can make further inquiry testing an occupant's purported citizenship such as, "What is your name? Where do you live? Where were you born? Where are you going?" and a myriad of other verbal probes. The officer may ask the occupants for birth certificates or naturalization papers.

In United States v. Brignoni-Ponce, ___ U.S. ___ (June 30, 1975), this Court held that the Fourth Amendment does not allow a roving patrol of the Border Patrol to stop a vehicle away from the border in order to question its occupants

regarding their citizenship, if the patrol officers have no reason to make the stop except that the occupants appear to be of Mexican ancestry. The Court in this opinion said that the governmental intrusions which occur in such random stops demand that the officers be aware of specific facts that reasonably warrant suspicion that the vehicles contain illegal aliens. In so holding this Court reaffirmed the Fourth Amendment guarantee described in Carroll v. United States, 267 U.S. 132 (1925), as the right to free passage over public highways without interruption or search, unless there is some known and sufficient reason to interrupt such passage.

Petitioner recognizes that the Constitution protects his freedom and privacy only against unreasonable governmental intrusion and that there can be no ready test in determining if an intrusion is reasonable other than by balancing the need to intrude against the invasion which such intrusion entails. Camara v. Municipal Court, 387 U.S. 523 (1967). If this Court undertakes to balance Petitioner's right to privacy against the need for such checkpoints, it can be fairly assumed that the Government will advance the same contentions it advanced in the Ortiz and Brignoni-Ponce cases, supra. The opinions in these cases indicate that the Government will point to the 10 or 12 million aliens which it claims are now illegally in the country, 85% of which are from Mexico. Since most of these illegal aliens migrate into the interior of the country where employment opportunities are better than near the border, the Government will maintain that these checkpoints are the very backbone of the Border Patrol's apprehension operations and that to deprive the Patrol of the right to systematically stop all vehicles coming away from the Mexican border will cripple, if not indeed shatter, the entire system of alien control. It will also be emphasized that each stop constitutes only a minor and brief intrusion upon the privacy of the persons stopped, that usually it consists of no more than a visual inspection from the vehicle's window and a brief word, after which the travelers continue their way without fear or other ill effect.

Petitioner, in reply, would respectfully submit that the two million or so people living along the Mexican border have endured the checkpoints for m

years. If, despite the extended operations of these devices, there are still 10 or 12 million illegal aliens at large in our country, then a substantial doubt should arise about the efficiency and necessity of the checkpoints.

Probably it is correct that a checkpoint stop does not evoke the same degree of fear as does a stop by a roving patrol, but this does not mean that the former evokes no apprehension at all from honest citizens. Each vehicle passing through such a checkpoint is in effect taken into custody until the officer in charge determines that there is no cause for detention or a more extensive search. Even the innocent, and especially the uneducated innocent, can experience apprehension when coming under such official scrutiny. Then too, there is the apprehension which comes when a driver wonders if all the vehicles moving up from behind are going to stop before he can leave his semi-fixed position on a major highway. Assuming that the checkpoints are well marked with stop signs and signals, one wonders how many drunks have been unable to comprehend that one must stop in the middle of the King Ranch at night. Statistics on such accidents are no doubt hard to come by, but it seems fair to assume that serious accidents have or will occur at these traffic impediments.

It is also submitted that to the law-abiding populace of the Mexican border area the checkpoints are irritating, annoying and oppressive. The people in the interior of the country who harbor, or at least tolerate, the transient aliens are not saddled with these devices. Virtually everyone who has lived in the Lower Rio Grande Valley for any period of time has had to undergo this same procedure again and again. It is impossible to travel north from the Lower Rio Grande Valley by automobile without going through a checkpoint. Naturally, the resentment generated by this procedure is magnified by repeated exposures to it. Is it not specious to contend that the impact of one isolated checkpoint stop is of little consequence, when the same checkpoint must be faced time and again by the border-area residents? About the only options a border-area resident has to the checkpoint are to stay at home or to go by air. Certainly the total impact of millions of checkpoint intrusions each year should be considered in weighing the reasonableness of these operations.

Perhaps some--especially those whose ox is not being gored--question why a checkpoint would generate any ill feelings at all, and the answer is this: free people are instinctively repelled by any and all governmental regimentation; furthermore, the media of cinema and television have forged a firm link in the public mind between checkpoints and the totalitarian forms of government. (Who can recall a film set in the Nazi terror which did not involve at least one gripping trip through a German-manned checkpoint?)

In the Brignoni-Ponce opinion, supra, this Court indicated that Mexican ancestry is at least a relevant factor in forming a suspicion that a person may be an alien. It was also said that the Government had pointed out that "trained officers" can recognize the characteristic appearance of persons who live in Mexico, relying on such factors as the mode of dress and haircut. What this really means is that most "wetbacks" have the dark hair, dark skin, and dark eyes of Mexicans (which they are), are poorly clothed, and are poorly groomed. Unfortunately, a substantial part of the citizens living in the border area have the same physical characteristics, as well as the same clothing and grooming problems. So it would appear that thousands of the poor who live along the border must approach these checkpoints with certain apparent and "suspicious" characteristics which, coupled with the customary old car or some other such innocent but "suspicious" accouterment, could earn them an unnecessary and unpleasant interlude of interrogation and search. Petitioner suggests that the bite of the checkpoints obviously is not equal for all the citizens that are forced to pass through them.

It should therefore be apparent that the traffic checkpoints create massive opportunities for discrimination and for abuse of police power. Petitioner would in this regard recall to this Court its words in McDonald v. United States, 335 U.S. 451 (1948):

> "The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals. Power is a heady thing; and history shows that the police acting on their own cannot be trusted." (Pages 455, 456.)

In the instant case the Border Patrol was violating constitutional prohibitions by operating a traffic checkpoint which systematically stopped every passing vehicle for interrogation and inspection without cause, suspicion or warrant, and the Border Patrol agent was therefore engaged in the unlawful enforcement of the law when he discovered the aliens lying down in Petitioner's car. The agent should not have stopped the car so that he could get into the position where the discovery was made. Petitioner was a "fish" caught in the Border Patrol's unconstitutional "fishing expedition."

The traffic checkpoints located many miles within this country are scabs on the fair face of our free society and should therefore be held unconstitutional. This Court can and should act to correct this situation, and a grant of this petition for writ of certiorari will provide an opportunity to do so.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted in order to resolve the important Fourth Amendment questions raised by this case and in order to protect the Fourth Amendment rights of Petitioner which were violated by the Government on the occasion in question.

Respectfully submitted,

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